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In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF

V.

STATE OF NEBRASKA, DEFENDANT

BRIEF OF DEFENDANT, STATE OF NEBRASKA, IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT OF STATE OF MISSOURI

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GROUNDS OF OPPOSITION

The defendant, State of Nebraska, respectfully submits that the Motion for Leave to File Complaint by the State of Missouri should be denied because the Complaint exhibited therewith fails in each of the following respects:

(1) It is insufficient to apprise the Court and the defendant of the issues involved.

(2) It does not state a justiciable controversy.

(3) It does not ask for relief which can be granted in the form requested.

(4) It seeks an opinion of the Court which is advisory in nature.

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(2) It does not state a justiciable controversy.

(3) It does not ask for relief which can be granted in the form requested.

(4) It seeks an opinion of the Court which is advisory in nature.

(5) It does not show a case of absolute necessity.

(6) It does not allege facts that are clearly sufficient to call for a decree in favor of the plaintiff.

(7) No threatened injury is alleged of serious magnitude and imminent.

Alternatively, if the Motion is not denied, the defendant respectfully submits that the Court should postpone the taking of jurisdiction of the Complaint until the possibilities of settlement by boundary compact have been fully explored by the States and that remedy has been exhausted.

ARGUMENT

This Court has established certain basic principles against which the Complaint exhibited by the plaintiff, State of Missouri, should be examined. The following language from *Alabama* v. *Arizona*, 291 U. S. 286, 291-292, is applicable to this Complaint:

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States*, 219 U. S. 346. *Willing* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas*, 176 U. S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against

another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois*, 200 U. S. 496, 520-521. *New York* v. *New Jersey*, 256 U. S. 296, 309. *North Dakota* v. *Minnesota*, 263 U. S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois*, *supra*, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U. S. 444, 458. The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669."

Although the Statement in Support of Motion seems to suggest that this is merely an action to establish a disputed interstate boundary which "is an action historically cognizable in equity and susceptible of judicial enforcement", the actual allegations of the Complaint should be examined in light of the above principles and it is submitted that the Complaint fails to meet the requisite standards.

The burden is upon the State asking leave to sue another to allege facts that are clearly sufficient to call for a decree in its favor. An examination of the facts alleged shows the Complaint to be seriously deficient in this regard.

Paragraph 4 of the Complaint states that Missouri and Nebraska share a common border in the Missouri River. Paragraph 5 alleges that there have been conflicting claims by parties purporting to own private

titles in lands adjacent to the river but fails to identify by description any of these lands. The length of the Missouri River between Nebraska and the State of Missouri is approximately 62 miles and, if this is a controversy as to boundary, defendant and this Court are entitled to a description of the specific areas which are in dispute and the factual basis for Missouri's claims to each parcel of land, together with a statement of the facts constituting conduct by the State of Nebraska with regard to each of those areas.

Although the Statement in Support of Motion for Leave to File Bill of Complaint states that the Complaint alleges "classical ox-bow situations where, due to flood, the Missouri River • • • has suddenly cut through necks of land and assumed new channels", there are no such references in the Complaint and it otherwise fails to state the interest of the State of Missouri in the situations described in Paragraph 5 of the Complaint.

Paragraph 5 mentions two court actions, one between private individuals, and another concerning title actions based upon "apparently unfounded claims for Nebraska taxes against lands on the Missouri side of the river which have been in the undisturbed possession of Missourians from time immemorial"; and it alleges the occurrence of tax sales and threatened tax sales in Nebraska courts against lands "on the Missouri side of the river which are and have been in the undisturbed possession of Missourians for generations and no foundation or explanation for said sales have been forthcoming." The fact that lands may have been in the undisturbed possession of Missourians does not constitute an allegation that the lands are within the

State of Missouri or proper subject of complaint on behalf of the State. The case of *Durfee* v. *Duke*, 375 U. S. 106, has been decided by this Court and should not now be the subject of further complaint without further explanation by the pleader. The interest of the private property claimants was determined in that case and if the State of Missouri is in reality bringing this action for the benefit of any individuals involved in that suit, jurisdiction should be refused as it is well established by the decisions that this Court will not entertain a proceeding on original jurisdiction by a State on behalf of its citizens or group of citizens and not in the interest of the State itself. *Massachusetts* v. *Missouri*, 308 U. S. 1; *Arkansas* v. *Texas*, 346 U. S. 368; *Oklahoma* v. *Gulf, Col. & Santa Fe Ry. Co.*, 220 U. S. 290.

The case of *Otoe County, Nebraska* v. *Nenneman* is not described with sufficient particularity to apprise the Court or the defendant of the alleged wrong. Similarly, the reference to tax sales and threatened tax sales stops short of allegation of injury to the State or its citizens. Allegations of conflicting claims to lands by parties are made but no allegation is made that the land is also taxed or claimed by Missouri or what the claims of Missouri are founded upon. Although Paragraph 6 of the Complaint alleges that the State of Missouri has sought to ascertain the nature of the claims made against its lands by the State of Nebraska but no explanation has been offered, the State of Missouri certainly should know what the facts are concerning the conduct of the State of Nebraska with regard to the specific areas.

The Complaint not only fails to show a threatened injury of serious magnitude and imminence but wholly

fails to state what the threatened injury to the State of Missouri might be.

There is no showing in the Complaint or Statement in Support thereof that a case of absolute necessity exists nor are there facts alleged that are clearly sufficient to call for a decree in favor of Missouri.

While the Complaint does not reveal specifically that it seeks an advisory opinion, the Complaint, particularly the prayer for relief, is so general in terms as to invoke the complete spectrum of judicial pronouncement. The prayer asks only that the "court exercise its jurisdiction and declare sovereignty in the State of Missouri over those lands bordering the State of Missouri which rightfully belong to the State of Missouri." It would seem the Court could make such a declaration without further proceedings and the result would be neither a determination of any rights nor the establishment of any principles for a future course of conduct.

The Complaint exhibited with the Motion for Leave to File presents only abstract questions concerning unspecified acts or threats of harm to Missouri or her citizens. This language from *New York* v. *Illinois*, 274 U. S. 488, 489-490, is appropriate to this situation:

> "* * * The bill, in its third paragraph, attempts to set up another injury from the diversion. This paragraph has not been answered, but is assailed by a motion to strike it out. The Court has heard oral argument on the motion and will now rule on it.
>
> "The third paragraph of the bill apparently proceeds on the theory that the diversion may interfere with or prevent the use of the waters of the

Niagara and St. Lawrence Rivers by the plaintiff State and her citizens for the development of power. But it does not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected. The waters are international and their use for developing power may require the assent of the Dominion of Canada and the United States. No consent of either is shown. The suit is one for an injunction, a form of relief which must rest on an actual or presently threatened interference with the rights of another. Plainly no basis for such relief is disclosed in what is said about water power development. At best, the paragraph does no more than present abstract questions respecting the right of the plaintiff State and her citizens to use the waters for such purposes in the indefinite future. We are not at liberty to consider abstract questions. New Jersey v. Sargent, 269 U. S. 328. So the motion to strike out the paragraph must be sustained. * * *"

No responsive pleading can traverse the allegations of the proposed Complaint, and this being so, the Complaint is so defective as to require denial of leave to file.

ALTERNATIVE REQUEST

Alternatively, if the Motion for Leave to File Complaint is not denied, the defendant respectfully submits that the Court should postpone the taking of jurisdiction of the Complaint until the possibilities of settlement by boundary compact have been fully explored by the States and that remedy has been exhausted.

The plaintiff has alleged in Paragraph 7 of the Complaint that it has "* * * further attempted to establish

a compact agreement with the State of Nebraska with respect to the common boundary, also to no avail." Plaintiff has also stated in its Statement in Support of Motion for Leave to File Complaint, "Repeated efforts, in good faith, have been made unsuccessfully by the States to resolve this dispute and avoid the present litigation. Only after all such efforts at settlement have been exhausted are the present Motion and Complaint filed."

The Affidavit of the Attorney General of Nebraska attached hereto and marked Appendix "A" refutes those statements. The fact is that officials of the two States had reached a general agreement concerning how to proceed and have been engaged in meaningful discussion in an attempt to settle the boundary problems. It was the defendant's understanding that the office of the Attorney General of Missouri was to make an initial draft of a proposed compact and submit it to the Nebraska Attorney General as a starting point towards the solution of the problems which the States might have. In addition, the States were attempting to identify those areas along the river which may be in dispute but this has not yet been completed.

If plaintiff is asking this Court to determine the entire boundary between Nebraska and Missouri and to establish claims by the State of Missouri to sovereignty over lands on both sides of the Missouri River, this could be an extremely lengthy and unwieldy task. Considering that the Missouri River flows for approximately 62 miles along Nebraska's eastern boundary from the southern boundary of Iowa to the northern boundary of Kansas and that there are also approximately 9 miles of established dry land boundary be-

tween Missouri and Nebraska around McKissick's Island, as determined by this Court in the case of *Missouri* v. *Nebraska*, 196 U. S. 23, and further taking into account the fact that the Complaint has not identified any specific areas along that approximately 62 miles of river, this case would appear to be a particularly appropriate one for the Court to hold in abeyance until the possible remedy by agreement has been completely explored. Appendix "A" states that the Nebraska Attorney General, Governor and State Surveyor are ready, willing and able to have further discussions and that there is no reason to believe that such discussions cannot lead to a satisfactory solution of the boundary problems. If the States might be able to settle their difficulties so as to obviate the necessity of a determination by this Court of the boundary location in every individual instance, such course should be pursued.

This Court has often recognized that a judicial solution is somewhat awkward and unsatisfactory and has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided in the compact clause of Article I, Section 10 of the Constitution of the United States. In *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 105-106, Mr. Justice Brandeis commented as follows:

> "* * * But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court sug-

> gested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington* v. *Oregon*, 214 U. S. 205, 217, 218; *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283. In *New York* v. *New Jersey*, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

In *New York* v. *New Jersey*, 256 U. S. 296, 313, the Court took jurisdiction in a case involving a suit by the State of New York to enjoin the State of New Jersey and its sewerage commissioners from discharging a large volume of sewage into the waters of Upper New York Bay. However, the Court dismissed the action without prejudice, concluding that the complainants had failed to show by the convincing evidence which the law requires that the sewage would so corrupt the waters of the bay as to create a public nuisance. The Court further observed:

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

Minnesota v. *Wisconsin*, 252 U. S. 273, 283, was an original action brought by Minnesota to establish the boundary line between Wisconsin and Minnesota in Upper and Lower St. Louis bays. The Court again de-

cided the case on the merits but concluded its opinion with the following observation:

> "It seems appropriate to repeat the suggestion made in *Washington* v. *Oregon, supra,* (214 U. S. 205) 217, 218, that the parties endeavor with consent of Congress to adjust their boundaries."

In *Washington* v. *Oregon,* 214 U. S. 205, 217, 218, another boundary case, the Court, in closing, quoted a joint resolution of Congress to enable the States of Mississippi and Arkansas to agree upon a boundary line and then said:

> "Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction."

In *Nebraska* v. *Wyoming,* 325 U. S. 589, 616, a case involving the apportionment of waters of an interstate stream, the Court in its opinion on the merits, stated:

> "* * * We noted in *Colorado* v. *Kansas, supra,* (320 U. S.) p. 392, that these controversies between States over the waters of interstate streams 'involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences

> of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.' But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution. * * *"

In all of the aforementioned cases, the Court did take jurisdiction but recognized that the type of problem involved should be settled by agreement if possible. The Complaint filed by Missouri does not identify any specific areas which may be claimed by the State of Nebraska and also claimed by the State of Missouri, nor are allegations made concerning the proper location of the boundary. The parties, through their negotiations, were in the process of attempting to identify such areas and determine whether agreement could be made concerning jurisdiction over these areas. They should be encouraged to continue this investigation and exploration of possibilities of amicable settlement. Should this fail, there is ample opportunity for resort to this Court.

Although we have cited no cases in which this Court has postponed taking jurisdiction on the grounds stated, there is precedent for such delay in other situations. This Court has postponed the taking of jurisdiction in an original action between States pending the determination of an action in a state court which might solve such dispute or provide a meaningful decision which would aid this Court in its determination.

In *Arkansas* v. *Texas*, 346 U. S. 368, the State of Arkansas filed a Motion for Leave to File Complaint charging that the State of Texas had illegally interfered with a contract between the University of Arkansas and a Texas charitable corporation. The Court indicated that the central question which the case tendered was whether the foundation had authority to spend its funds for furtherance of the Arkansas project and this was necessarily a question of Texas law because the foundation obtained its existence and its powers from Texas. Litigation was then pending in the Texas courts which would authoritatively determine what the Texas law was and the Supreme Court therefore continued the Motion until the litigation in the Texas courts had been concluded.

The State of Nebraska suggests that the two States should be given further opportunity to adjust their boundary problems prior to the taking of jurisdiction by this Court. Missouri has not alleged any injury to it by past failure to reach agreement and does not allege any imminent damage or injury pending future determination. If it can be inferred from Missouri's allegations that they are still interested in pursuing negotiations, Nebraska officials would welcome further discussions and will participate in good faith in accordance with the Affidavit attached hereto as Appendix "A".

CONCLUSION

The State of Nebraska respectfully contends that the Motion for Leave to File Complaint should be denied. In the alternative, the State of Nebraska respectfully submits that this Court should postpone the taking of

jurisdiction until the possibilities of settlement between the States have been exhausted.

Respectfully submitted,

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APPENDIX "A"

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V.

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AFFIDAVIT

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

CLARENCE A. H. MEYER, being first duly sworn, on oath deposes and says:

He is, and has been since January 5, 1961, the Attorney General of the State of Nebraska.

On December 31, 1961, he and Governor Frank B. Morrison, then Governor of the State of Nebraska, met in Kansas City, Missouri, with Governor John M. Dalton, then Governor of Missouri, and Attorney General Thomas F. Eagleton, then Attorney General of Missouri, and discussed the mutual problems between the two states along their Missouri River boundary.

At that time, the parties agreed that, after surveys were completed and disputed areas pinpointed, there would be a further meeting between the parties at which time a determination would be made as to whether the problem could best be resolved through a boundary commission or whether it would be best to proceed by means of a friendly action in the Supreme Court of the United States.

During the 72nd session of the Nebraska Legislature (1961), Legislative Resolution 38 was adopted requesting the Board of Educational Lands and Funds and the State Surveyor to make a survey of the boundary of the State where the same was formed by the Missouri River, to obtain and file in its offices its maps, charts, surveys, records and other documents and materials as may be essential or helpful in determining the boundary or titles to lands along the river. Pursuant to the authority vested by the Board of Educational Lands and Funds and the aforementioned Legislative Resolution 38, Willis L. Brown, the State Surveyor, embarked on the task of making surveys of the boundary of the State along the Missouri River including those places where the State is contiguous to the States of South Dakota, Iowa and Missouri. A great deal of time and effort has been spent by the State Surveyor's Office in the investigation, compilation and collection of this data, much of which has pertained to border areas of South Dakota and Iowa, but a considerable amount of which has pertained to the Missouri border.

Some time prior to February 25, 1964, Mr. Willis Brown, Nebraska State Surveyor, met with a Mr. Riddle, a surveyor employed by the State of Missouri in connection with the boundary, concerning the boundary

problem. On or about February 26, 1964, Mr. Brown received a letter from Missouri Governor Dalton's legal assistant stating, among other things, that:

> "Mr. Riddle has resigned as the State Surveyor for Missouri in connection with the boundary line between Missouri and Nebraska. A new Surveyor for Missouri for this project has been appointed. He is Mr. E. I. Myers, Law Building, 1207 Grand Avenue, Kansas City, Missouri, telephone No. BA1-1512."

Mr. Brown and Mr. Howard H. Moldenhauer, Special Assistant Attorney General of Nebraska, met with Mr. Myers and Mr. Howard McFadden, an Assistant Attorney General of Missouri, in Mr. Myers' office at Kansas City, Missouri, on Tuesday, March 3, 1964, to consider the boundary. At that time, the parties discussed a program of meetings or hearings at various places along the Missouri River at which time property owners and others who would be affected by a Compact could attend and state their problems. One such meeting was held in Mound City, Missouri, on March 16, 1964, at which Mr. Willis Brown and Mr. E. I. Myers were in attendance.

A meeting was arranged by Governor Dalton and Governor Morrison which was held in Lincoln, Nebraska on August 31, 1964. Present at this meeting from the State of Missouri were Mr. E. I. Myers, Surveyor, Mr. Howard McFadden, Assistant Attorney General, Mr. John Inglish, Attorney-at-Law, and Mr. Wayne W. Waldo, Legal Assistant to Governor Dalton. Present for the State of Nebraska were Mr. Willis Brown, State Surveyor, and Mr. Howard H. Moldenhauer, Special Assistant Attorney General of Nebraska. The purpose of this meeting was to lay the groundwork for

action by Nebraska's 11-member boundary commission at a future date. As a result of this meeting, Mr. Howard McFadden, Assistant Attorney General of Missouri, was to prepare an initial draft of a proposed Compact between the two states to settle their boundary problems.

It was decided at the meeting that an initial rough draft of a Boundary Compact would be prepared by Mr. McFadden, the Assistant Attorney General of Missouri, with the hope that, when the boundary commission or appropriate Nebraska body met to discuss the situation, they would have before them something to work with. Mr. Moldenhauer was to write Mr. McFadden a letter outlining some of the problems which had been encountered as a result of the experience with Iowa or with suggestions to eliminate some of these problems. Pursuant to this understanding, Mr. Moldenhauer prepared and sent a letter to Mr. McFadden dated September 11, 1964, stating the types of problems which should be anticipated in the preparation of a preliminary draft of a possible boundary compact between Missouri and Nebraska. The letter concluded with the following sentence: "We shall look forward to your initial draft."

Mr. Moldenhauer and the Nebraska Attorney General's Office have never received any response to that letter or any draft of a proposed compact, and this office was awaiting such a draft up until the filing of the complaint by the State of Missouri in this case.

On or about March 23, 1965, Mr. Moldenhauer received a telephone call from a Representative Cox, a member of the Missouri Legislature, who told Mr.

Moldenhauer he wanted to inform Nebraska officials that he was introducing a proposed bill which would constitute a boundary compact between the States of Missouri and Nebraska and he wanted to explain that this was being done in order to meet a deadline which existed concerning the introduction of new legislation in Missouri. Representative Cox explained that, should Nebraska officials hear of the proposed bill, they should not take it to mean that Missouri was proceeding unilaterally or without further consultation with Nebraska. Representative Cox further indicated that there was to be a meeting the following day of State officials in Jefferson City concerning this matter and he hoped that they would be in further contact with Nebraska officials to work on the problem. Neither Mr. Moldenhauer nor the Nebraska Attorney General's Office received any further messages from the State of Missouri concerning a proposed boundary compact, prior to notice that the Complaint in this case was being filed.

Mr. Willis Brown, Nebraska State Surveyor, has also furnished maps to Mr. Myers, and Mr. Brown and Mr. Myers have had miscellaneous other discussions, meetings or telephone conversations concerning the boundary problems. In none of these conferences was it ever indicated that the States were at an impasse or that negotiations had reached a stage where agreement could not be reached.

Affiant, as Attorney General, at no time prior to the notice of filing of this Complaint by the State of Missouri, considered that efforts at settlement of the boundary problems had been exhausted, but as previously stated, affiant was awaiting a draft of a proposed com-

pact from the Attorney General's Office of the State of Missouri.

The Nebraska Attorney General, Governor of Nebraska and State Surveyor, stand ready, willing and able to meet with, or have their representatives meet with, representatives of the Missouri Attorney General's Office or the Missouri Governor's Office to resume the discussions concerning the boundary in accordance with the oral agreement of December 31, 1961. Affiant has no reason at this time to believe that such discussions, from Nebraska's standpoint, cannot reach a satisfactory solution to the boundary problems between Nebraska and Missouri.

_____

Clarence A. H. Meyer

Subscribed and sworn to before me this ..... day of July, 1967.

_____

Notary Public

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July ....., 1967, I served a copy of the foregoing BRIEF OF DEFENDANT, STATE OF NEBRASKA, IN OPPOSTION TO MOTION FOR LEAVE TO FILE COMPLAINT OF STATE OF MISSOURI by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

Honorable Warren E. Hearnes
Governor of the State of Missouri
State Capitol
Jefferson City, Missouri

Honorable Norman H. Anderson
Attorney General,
State of Missouri
Supreme Court Building
Jefferson City, Missouri

Brick P. Storts, III
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

Howard L. McFadden
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

such being their post office addresses.

Clarence A. H. Meyer
Attorney General,
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State Capitol Building
Lincoln, Nebraska 68509